Atlantic Plantation Sdn Bhd v Mature Land Sdn Bhd

HIGH COURT (SANDAKAN) — NO CSS 22–28 OF 2005
LEE HENG CHEONG JC
20 JANUARY 2010

Contract — Sale and purchase of land — Breach — Illegal occupation of land — Whether defendant failed to deliver vacant possession of whole of land as per terms of SPA — Whether plaintiff entitled to damages for loss suffered as a result of breach — Whether there was duty to mitigate loss — Whether plaintiff entitled to specific performance — Contracts Act 1950 s 75

The plaintiff and defendant entered into an agreement whereby the defendant agreed to sell and the plaintiff agreed to buy a parcel of land measuring 500.13 acres situated in Sabah ('the land') at the price of RM5,501,430. It was a term of the sale and purchase agreement ('the SPA') that the completion would take place within three months from the date of the agreement after the plaintiff had paid the balance of the purchase price of the said land. The plaintiff duly paid the full purchase price and therefore fulfilled all its obligations under the SPA on 8 October 2004. The plaintiff took possession of the land on 9 October 2004 pursuant to the terms of the SPA. Sometime on 5 November 2004, the plaintiff discovered that there were third parties occupying 51.37 acres of the land, and complained to the defendant. The defendant maintained that it had evicted all the illegal occupiers from the land before the execution of the SPA. The plaintiff then commenced the instant action against the defendant on the grounds that the latter had failed to deliver vacant possession of the whole of the land pursuant to the SPA and thus was in breach of the SPA. The defendant submitted that it had already evicted the illegal occupiers and in support thereof produced documents to prove that it had paid compensation amounting to RM170,890.85 to 12 illegal occupiers between 25 March 2004 and 21 June 2004. The defendant thus contended that the illegal occupation had occurred after the plaintiff had taken possession of the land. The defendant further averred that in the alternative the plaintiff should be deemed to have inspected the land when accepting vacant possession of the same and that therefore the plaintiff was precluded under the SPA from objecting to the fact that there were illegal occupiers about a month after delivery of vacant possession. In the course of the trial contradicting oral testimonies were put before the court. One Lasim bin Abdul Latif ('Lasim'), who used to work for the defendant and then joined the plaintiff in the year 2000, testified that the present illegal occupiers were the same ones who occupied the land before the land was sold to the defendant. Lasim also testified that these illegal occupiers

occupied the land adjoining the subject land. The defendant's witness, the manager managing the estate, ('the defendant's manager') testified that the defendant had already compensated the illegal occupiers and their houses on the land had been demolished. However this witness was unsure as to whether the illegal occupiers had breached the agreement between them and the defendant after eviction. The most crucial issue for determination in this case was whether the defendant had delivered vacant possession of the land as per the terms of the SPA.

Held, allowing the plaintiff's claim in part subject to certain variations with costs:

(1) In the absence of any relevant documentary evidence and with two sets of contradicting oral testimonies the court had to rely on the more reasonable version of the events. After analysing the testimonies of the plaintiff and the defendant, and in particular that of Lasim and the defendant's manager, it was found that Lasim was more credible. The evidence adduced also indicated that the illegal occupiers had refused to honour whatever arrangement reached between them and the defendant and so the illegal occupiers' problem still persisted. Even though the illegal occupiers were staying on land which adjoins the property, the fact that they exercised control over that portion of the land such as to deny the plaintiff the right to enter and/or harvest fruits from that portion of the land would mean that the defendant had not delivered vacant possession of the land to the plaintiff. Further, since the illegal occupiers were not staying on the land meant that even if there was an actual inspection of the land, it would not be possible to discover the existence of the illegal occupiers on the land (see paras 8, 14(b) & (e)).

(2) The loss and damage suffered by the plaintiff was that it did not receive the 50.13 acres which it had paid for and its inability to harvest oil palm fruits from the said 50.13 acres. However, the plaintiff's claim as contained in the statement of claim which was based on the SPA was excessive and unreasonable, taking into consideration that the defendant only failed to deliver vacant possession of 50.13 acres out of 500.13 acres of the land, which represented 10% of the whole of the land. Based on s 75 of the Contracts Act 1950 the reasonable compensation to be paid to the plaintiff would be based on 51.37 acres or 10% of the land. As such the 10%pa stated in the SPA should be based on the value of 51.37 acres ie RM565,686.44 (see paras 16 & 19–21).

(3) Specific performance as prayed for by the plaintiff should not be ordered against the defendant because it was too onerous. The illegal occupiers' problem was too long outstanding and even if the defendant

A obtained the necessary court order it would be difficult to enforce the same against the illegal occupiers (see para 29).

(4) The fact that the plaintiff commenced legal action against the occupiers showed its attempt to mitigate its loss even though it was not successful in resolving the problem of the illegal occupiers (see para 40).

B

(5) Whether the plaintiff was informed about the existence of squatters or not was not material once the SPA was signed, since all the terms and conditions contained in the SPA would supersede and override all or any oral representations (see para 49).

C

[Bahasa Malaysia summary

Plaintif dan defendan memasuki satu perjanjian di mana defendan bersetuju untuk menjual dan plaintif bersetuju untuk membeli sebidang tanah seluas 500.13 ekar yang terletak di Sabah ('tanah tersebut') pada harga D RM5,501,430. Adalah terma-terma perjanjian jual beli tersebut ('PJB') bahawa penyelesaian adalah dalam masa tiga bulan daripada tarikh perjanjian selepas plaintif membayar baki harga belian tanah tersebut. Plaintif telah membayar harga belian penuh dan oleh itu telah memenuhi tanggungjawabnya di bawah PJB pada 8 Oktober 2004. Plaintif mengambil E milikan tanah tersebut pada 9 Oktober 2004 menurut terma-terma PJB. Kira-kira pada 5 November 2004, plaintif mendapat tahu bahawa terdapat pihak ketiga yang menduduki 51.37 ekar tanah tersebut, dan mengadu kepada defendan. Defendan menegaskan bahawa ia telah menghalau kesemua penduduk tidak sah dari tanah tersebut sebelum menandatangani F PJB tersebut. Plaintif kemudian memulakan tindakan ini terhadap defendan atas alasan bahawa plaintif telah gagal memberikan milikan kosong keseluruhan tanah menurut PJB dan oleh itu telah memungkiri PJB. Defendan menghujah ia telah menghalau kesemua penduduk tidak sah dan sebagai sokongan mengemukakan dokumen-dokumen untuk membuktikan G bahawa ia telah membayar pampasan berjumlah RM170,890.85 kepada 12 penduduk tidak sah di antara 25 Mac 2004 dan 21 Jun 2004. Defendan oleh itu menghujah bahawa pendudukan tidak sah telah berlaku selepas plaintif mengambil milikan tanah tersebut. Defendan selanjutnya menyatakan bahawa sebagai alternatif plaintif harus dianggap telah memeriksa tanah H tersebut semasa menerima milikan kosong tanah tersebut dan oleh itu plaintif dihalang di bawah PJB daripada membantah fakta bahawa terdapat penduduk tidak sah selepas kira-kira sebulan selepas pemberian milikan kosong. Semasa perbicaraan keterangan lisan yang bertentangan dikemukakan di mahkamah. Seorang yang bernama Lasim bin Abdul Latif I ('Lasim'), yang pernah bekerja dengan defendan dan kemudian bekerja dengan plaintif pada tahun 2000, memberi keterangan bahawa penduduk tidak sah yang ada sekarang adalah yang sama yang menduduki tanah tersebut sebelum tanah tersebut dijual kepada defendan. Lasim juga memberi keterangan bahawa penduduk tidak sah ini menduduki tanah bersebelahan

dengan tanah tersebut. Saksi defendan, pengurus hartanah tersebut, (pengurus defendan) memberi keterangan bahawa defendan telah memberi pampasan kepada penduduk tidak sah tersebut dan rumah mereka di atas tanah tersebut telah dirobohkan. Walau bagaimanapun saksi ini tidak pasti sama ada penduduk-penduduk tidak sah tersebut telah memungkiri perjanjian di antara mereka dan defendan selepas pengusiran. Isu paling utama yang perlu diputuskan di dalam kes ini adalah sama ada defendan telah memberikan milikan kosong tanah seperti di dalam terma-terma PJB.

Diputuskan, membenarkan sebahagian tuntutan plaintif tertakluk kepada beberapa variasi dengan kos:

(1) Dalam ketiadaan keterangan dokumentar yang relevan dan dengan dua set keterangan lisan yang bertentangan mahkamah terpaksa bersandar kepada versi yang lebih munasabah mengenai kejadian tersebut. Selepas menganalisa keterangan plaintif dan defendan, khususnya keterangan Lasim dan pengurus defendan, didapati bahawa Lasim lebih boleh dipercayai. Keterangan yang dikemukakan juga menunjukkan bahawa penduduk tidak sah telah ingkar untuk menunaikan apa-apa aturan yang dicapai di antara mereka dan defendan dan oleh itu masalah penduduk tidak sah masih berterusan. Walaupun penduduk tidak sah menduduki tanah yang bersebelahan dengan hartanah tersebut, fakta bahawa mereka mempunyai kawalan atas bahagian tanah yang tersebut sehingga menafikan plaintif hak untuk memasuki dan/atau menuai hasil kelapa sawit dari bahagian tanah tersebut bermaksud bahawa defendan tidak memberikan milikan kosong tanah tersebut kepada plaintif. Selanjutnya, oleh kerana penduduk tidak sah tidak tinggal di atas tanah tersebut bermakna bahawa walaupun pemeriksaan yang sebenar dilakukan di atas tanah tersebut, tidak mungkin boleh mengetahui kewujudan penduduk tidak sah di atas tanah tersebut (lihat perenggan 8, 14(b) & (e)).

(2) Kerugian dan kerosakan yang dialami oleh plaintif adalah bahawa ia tidak menerima 50.13 ekar yang telah dibayarnya dan kegagalan untuk menuai hasil kelapa sawit daripada 50.13 ekar tersebut. Walau bagaimanapun, tuntutan plaintif seperti yang terkandung di dalam pernyataan tuntutan yang berdasarkan PJB adalah melebihi dan tidak munasabah, dengan mempertimbangkan bahawa defendan telah gagal untuk memberikan milikan kosong 50.13 ekar tanah daripada jumlah 500.13 ekar tanah, yang mewakili 10% daripada keseluruhan tanah tersebut. Berdasarkan s 75 Akta Kontrak 1950 pampasan yang munasabah yang perlu dibayar kepada plaintif adalah berdasarkan kepada 51.37 ekar atau 10% daripada tanah tersebut. Oleh itu 10% setahun yang dinyatakan di dalam PJB sewajarnya didasarkan atas nilai 51.37 ekar iaitu RM565,686.44 (lihat perenggan 16 & 19–21).

(3) Pelaksanaan spesifik seperti yang dipohon oleh plaintif tidak harus diperintahkan terhadap defendan kerana ia terlalu membebankan. Masalah penduduk tidak sah tertangguh terlalu lama dan walaupun defendan memperoleh perintah mahkamah yang perlu adalah sukar untuk melaksanakannya terhadap penduduk tidak sah (lihat perenggan 29).

(4) Fakta bahawa plaintif memulakan tindakan undang-undang terhadap penduduk-penduduk tersebut menunjukkan bahawa percubaan untuk mengurangkan kerugian walaupun ia tidak berjaya dalam menyelesaikan masalah penduduk tidak sah (lihat perenggan 40).

(5) Sama ada plaintif diberitahu atau tidak mengenai kewujudan setinggan tidak material sebaik sahaja PJB ditandatangani, kerana kesemua terma dan syarat yang terkandung di dalam PJB tidak menggantikan dan mengatasi kesemua atau mana-mana representasi lisan (lihat perenggan 49).]

Notes

For cases on breach of contract, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4910–4922.

Cases referred to

Bonham Carter v Hyde Park Hotel Ltd [1948] WN 89 (refd)
Boo Kok Ngeak & Anor v Lim Kian Hoe & Anor [1998] 6 MLJ 727, HC (folld)
Jamal v Moola Dawood Sons & Co [1916] 43 IA 6, PC (refd)
Lee Hoy & Anor v Chen Chi [1971] 1 MLJ 76, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (folld)
Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577, FC (folld)
Narayanan Chettiar s/o Raman Chettiar v Samuel Jivamoney Dass s/o Chelliah [1986] 1 CLJ 579, HC (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (folld)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)
Topfell Ltd v Galley Properties Ltd [1979] 1 WLR 446, Ch D (refd)

Legislation referred to

Contracts Act 1950 ss 74, 75
Evidence Act 1950 ss 91, 92
Specific Relief Act 1950 ss 11, 11(2), 18, 21

Joey Wong (J Wong & Associates) for the plaintiff.
Grace Lo (MF Poon Hiew & Associates) for the defendant.

Lee Heng Cheong JC:

STATEMENT OF AGREED FACTS

[1] The parties have agreed on the following statement of agreed facts:

(a) The defendant is a company incorporated in Malaysia and having its office at Lot 8 & 9, T3, Taman Tshun Ngen, Mile 5, Jalan Labuk, 90000 Sandakan, Sabah.

(b) By an agreement dated 15 July 2004 made between the plaintiff and the defendant, the defendant, agreed to sell and the plaintiff agreed to buy a parcel of land held under country lease No 095324833 measuring 500.13 acres situate at Koyah, in the District of Kinabatangan, Sabah at the price of RM5,501,430 (for brevity, 'SPA').

(c) The agreement provided for the sale to be completed on 15 October 2004 and in accordance with cl 2(c) thereof the completion date had taken place within three months from the date of the said agreement, that is, on 8 October 2004 when the defendant's solicitors had on their behalf actually received the balance of the purchase price of the said land, and that the defendant should then give vacant possession of the said land to the plaintiff within one day of full payment of the purchase price.

(d) The defendant shall deliver vacant possession of the said land together with oil palm trees remaining intact to the plaintiff within one day from the date of full payment of the purchase price to the defendant or its solicitors, failing which or any delay in such delivery the defendant shall pay the plaintiff interest at 10%pa on the purchase price calculated on a daily basis till the date of delivery of vacant possession without prejudice to the plaintiff's rights to other remedies in a court of law.

(e) In the event of the defendant's breach of any provisions of the said agreement or any willful refusal or neglect to complete the sale and purchase of the said land subject to the plaintiff having performed all its obligations there under, the plaintiff shall be entitles to sue for specific performance of the agreement together with loss and damage and all costs and expenses incurred by the plaintiff in connection therewith including solicitor's costs on a solicitor and client basis.

(f) The plaintiff duly paid the defendant's solicitors the full purchase price of RM5,501,430 by 6 October 2004 and had performed and fulfilled all its obligations under the said agreement.

(g) The defendant had confirmed that vacant possession of the said land had been delivered to the plaintiff on 9 October 2004.

(h) The plaintiff's solicitors gave notice in writing to the defendant on 5 November 2005 for delivery of vacant possession of the said land by demanding an immediate action for eviction of the illegal occupier and for loss and damages suffered in breach of the said agreement.

(i) The government has acquired an estimated 29 acres of the subject land.

STATEMENT OF ISSUES TO BE TRIED

[2] The parties have also agreed on the following statement of issues to be tried:

(a) Did the defendant deliver vacant possession of the whole of the subject land (500.13 acres) to the plaintiff on 8 October 2004 within one day after full payment of the purchase price was effected by the plaintiff on 7 October 2004 or at all, failing which the defendant had breached, inter alia, cl 5 of sale and purchase agreement ('SPA') dated 15 July 2004?

(b) Did the plaintiff suffer any loss and damage in consequence of the defendant's non-delivery of vacant possession of the said land or part thereof in breach of contract?

(c) What is the quantum of such loss and damage?

(d) Is the plaintiff under a duty to mitigate its loss in consequence of the defendant's breach of contract by its failure to deliver vacant possession of the said land to the plaintiff timorously or at all?

(e) Whether the defendant, by the SPA made between the plaintiff and the defendant, had made or given any warranty that the whole of the subject land shall be free from illegal occupiers upon delivery of vacant possession of the subject land to the plaintiff?

(f) Whether the plaintiff shall be precluded or stopped from making requisition and/or objection in respect of the illegal occupiers occupying part of the subject land in light of cl 18 and item 2 of the recital of the SPA?

(g) Whether the defendant is in breach of the SPA in particular cl 5 thereof ie failing to deliver vacant possession of the subject land within the period stipulated whereby in fact the plaintiff's actual complaint against the defendant only concern the illegal occupiers occupying approximately 51.37 acres more or less out 500.13 acres of the subject land?

(h) Whether the plaintiff owes the defendant a duty to mitigate its losses in consequence of the defendant's breach of the SPA and if so, whether the plaintiff had acted promptly to mitigate its losses?

(i) Whether plaintiff was informed by one Dato' Loo Pang Kee of the existence of squatters on the demised land?

CASE FOR THE PLAINTIFF

[3] The plaintiff contends that the defendant is in breach of the SPA, by failing to deliver vacant possession of the said land to them, that is by failing to deliver about 51.37 acres out of 500.13 acres of the land which is the subject matter of the SPA from the date of completion of the SPA until to date in that the said 51.27 acres was still occupied or controlled by third parties who obstructed the plaintiff from harvesting oil palm fruits there. The final payment of the purchase price for the said land was paid 8 October 2004 and the plaintiff took possession of the said land on 9 October 2004 pursuant to the terms of the SPA. Sometime on 5 November 2004, the plaintiff discovered that there were third parties occupying the said 51.37 acres who are still occupying the said land to date.

[4] As a result of the failure of the defendant to deliver vacant possession of the said 51.27 acres of the said land to the plaintiff, the plaintiff suffered loss and damage.

CASE FOR THE DEFENCE

[5] The defendant contends that they have already evicted all the illegal occupiers from the said land even before the said land was put up for sale, some two months earlier. Furthermore at the time of signing of the SPA, the defendant contended that he had informed the plaintiff that the illegal occupiers' problem had been resolved, that there was no response from the plaintiff who went ahead and signed the SPA.

[6] The defendant produced documents to prove that compensation amounting to RM170,890.85 were paid to 12 illegal occupiers between 25 March 2004 and 21 June 2004.

[7] The defendant further contended that the illegal occupation occurred after the plaintiff had taken possession of the said land and that the plaintiff was not vigilant enough to prevent the illegal occupation of the said land from occurring.

APPROACH OF THE COURT

[8] What I have before me are two sets of oral testimonies, one contradicting each other and this court is put in a situation of deciding whom

to believe in the absence of any relevant documentary evidence. In dealing with such a situation, I ask myself the question 'which version of the events is more reasonable in the circumstances of this case' and in coming to my conclusion, I was guided by what was said in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 by Chang Min Tat J (as he then was) at p 230:

> For myself, I would with respect feel somewhat safer to refer and reply on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[9] And also what is stated in the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at p 116 where the Court of Appeal held as follows:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of what witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case. The approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.

FINDINGS OF THE COURT ON EACH OF THE AGREED ISSUES TO BE TRIED

Did the defendant deliver vacant possession of the whole of the subject land (500.13 acres) to the plaintiff on 8 October 2004 within one day after full payment of the purchase price was effected by the plaintiff on 7 October 2004 or at all, failing which the defendant had breached, inter alia, cl 5 of the SPA?

[10] This is the most crucial issue as a determination of this issue in favour of the defendant will render all other agreed issues academic. In determining this issue, it is necessary to read cl 5 of the SPA which states as follows:

> The Vendor shall deliver vacant possession of the said Land together with oil palm trees remaining intact to the purchaser within one (1) day from the date of full payment of the purchase price to the Vendor or its solicitors, Provided That in the event the Vendor fails or refuses to deliver vacant possession of the said Land within the stipulated period, the Vendor shall pay the Purchaser interest at 10% per annum on the purchase price calculated on a daily basis till the date of delivery of vacant possession without prejudice to the Purchaser's rights to other remedies in a court of law.

[11] Before I rule on this issue, it would be relevant to consider what is the meaning of 'vacant possession' in the context of sale of landed property. I refer to *Boo Kok Ngeak & Anor v Lim Kian Hoe & Anor* [1998] 6 MLJ 727, where Kamalanathan Ratnam J held as follows:

> In *Topfell Ltd v Galley Properties Ltd* [1979] 1 WLR 446, the court defined vacant possession as a term applied to premises sold or offered for sale and not subject to a lease, where the vendor must give vacant possession on completion, subject to an agreement to the contrary. *The court also held that vacant possession meant more than being empty and unoccupied. The property conveyed must be capable of occupation by a purchaser. It is my judgment that the term 'vacant possession' connotes the handing over of lawful and complete possession of a said property to another in a vacant condition and thus capable of occupation and free from any claim of right of possession either by the vendor or any other party*. (Emphasis added.)

[12] It is common ground that the handing over of the said land took place on 9 October 2004, that the handing over should be completed by 12 noon on that day and that there was no inspection of the whole of the said land on that day as the plaintiff's representative only came at 11am that day. On the 5 November 2004, the plaintiff discovered that there were 'illegal occupiers' on the said land when they tried to harvest oil palm fruits from one area of the said land. The plaintiff then complained to the defendant about existence of the 'illegal occupiers' about one month after the handing over of he said land to the plaintiff.

[13] In his defence to this agreed issue, the defendant avers that prior to the delivery of vacant possession of the said land to the plaintiff, the defendant has successfully evicted all the illegal occupiers through the process of court as well as compensating all of them and that at the time of delivery of vacant possession of the said land to the plaintiff there were no more illegal occupiers on the said land and in the alternative, even if there were illegal occupiers occupying the said land, the defendant avers that they should have came into the said land after vacant possession of the same was duly delivered to the plaintiff and hence it is no longer the obligation or responsibility of the defendant to evict the alleged illegal occupiers and/or to ensure the plaintiff's exclusive possession of the said land. The defendant further avers that in the

alternative, by virtue of cl 18 of the SPA, the defendant avers that the plaintiff shall be deemed to have inspected the said land and satisfied with the state of the said land when accepting vacant possession of the same and the plaintiff shall not be entitled to make any requisition and/or objection to the state of the said land. The plaintiff contended in essence that at all material times, the defendant failed to deliver vacant possession of the whole of the said land pursuant to cl 5 of the SPA and thus was in breach of cl 5 of the SPA.

[14] After considering all the relevant oral testimonies and documentary evidence, I find that the defendant failed and/or omitted to deliver vacant possession to the plaintiff at the material time based on the following reasons:

(a) PW4 Lasim bin Abdul Latif who used to work for the defendant on the said land from the years 1998–2000 and then joined the plaintiff in the year 2006, testified that he was aware of the illegal occupiers on the said land, that fruits from that area were never harvested and they were harvested by the illegal occupier. The 'illegal occupiers' were on the said land since the year 1998 and until he stopped working for the defendant in the year 2000. PW4 identified the present illegal occupier as the same illegal occupiers and further stated that they stayed next to the land on their own land which adjoins the said land and that despite court action by the plaintiff the illegal occupiers refused to leave and if 'they were asked to leave, they would ask the police to shoot and after they die, then they leave'.

On the other hand the defendant's witness, DW1 Abdul Rauf bin Baba testified during cross-examination that after court action was taken by the defendant, there were no more people staying there and that the defendant paid compensation to 13 Kampung people who agreed not to enter into the land. The defendant took over the land occupied by them and built roads, plant oil palm and harvest fruits there. When cross-examined as to whether he knew that the illegal occupiers never entered the land after eviction. DW1 said 'I am not sure. As far as I know, I did not see them entering the land again. If they go at night, I won't know because they are staying next to the land'. When DW1 was asked to confirm that they never disturb or take harvest from the defendant after the eviction, DW1 answered that 'After compensating them, I did not see them entering the land again'. DW1 further testified, 'I am the manager managing the estate and that every details of problem will be related to me and I know everything going on in the estate. I know all employees at the material time. I know the management people of my company and that after payment of compensation, no police reports lodged. After the said land was transferred to plaintiff, I am still working for the defendant. In Mature Land S/B, I am the manager and I have an estate staff. Rothwell was the acting GM'. DW1 also said that he does not know Lim Kee Fah. When

asked whether he would agree that it is possible that the illegal occupiers breached the agreement, he said that he was not sure.

(b) Having analysed the testimonies of the witnesses of the plaintiff and the defendant, in particular PW4's and DW1's testimonies, I accept the testimony of PW4 as the testimony of DW1 is inconsistent and not credible. DW1 on one hand said that the illegal occupier's houses on the said land were demolished and then said that they were not staying on the said land but on land which adjoins the said land. He also said that he was at that material time the manager of the defendant for the said land and that he knew everyone, yet he did not know Lim Kee Fah who is the manager of the defendant and who lodged a police report on 11 August 2004 over theft of oil palm fruits at the said land. The lodging of the said report by Lim Kee Fah contradicted the testimony of DW1 who said 'After payment of compensation, no police reports lodged'. DW1 was also unsure as to whether the illegal occupiers had beached the agreement between them and the defendant.

Even though the defendant have paid compensation to the illegal occupiers and all houses on the said land were demolished, does it in fact and in truth mean that the defendant have delivered vacant possession to the plaintiff? I think not. From the said police report lodged by Lim Kee Fah, the defendant's manager, some 26 days after the SPA was signed, he was still complaining that the illegal occupiers were still stealing oil palm fruits and trespassing despite being compensated. This showed that the illegal occupiers have not or refused to honour whatever arrangement reached between them and the defendant, so the illegal occupiers' problem still persists.

Even though there may not be any illegal occupiers staying on the said land but they are staying on land which adjoins the said land. The fact that they exercised control over that portion of the said land such as to deny the plaintiff the right to enter and/or harvest fruits from that portion of the said land, would mean that the defendant did not deliver vacant possession of the said land to the plaintiff at the material time within the meaning of vacant possession as laid down in *Topfell Ltd v Galley Properties Ltd* [1979] 1 WLR 446.

(c) The lodging of a police report by Lim Kee Fah on 11 August 2004 (exhibit p 100 of bundle B) pertaining to theft of oil palm fruits on the said land clearly showed the illegal occupier problem is not solved yet even though they were paid compensation in the months of March and June, 2004.

(d) The fact that the present illegal occupiers are the same illegal occupiers during the time before the said land was sold to the plaintiff showed that the illegal occupiers' problem was not resolved yet. DW1 and DW3 both confirmed that the illegal occupiers' problem is a long

outstanding one. DW3 said that when the defendant first bought the said land from the previous owner, the illegal occupiers' problem already existed. In the light of the aforesaid, I find that it is most probable that the illegal occupiers' problem still persists.

(e) It is common ground that at the time of handing of the said land which took about an hour, both the plaintiff and the defendant did not, in fact conduct an inspection of the said land or sign any documents to confirm that vacant possession of the said land was indeed handed over to the plaintiff. In the light of the aforesaid I find that the plaintiff's complaint about the existence of illegal occupiers on the said land about one month later is reasonable and acceptable as the plaintiff explained that they only discovered about the illegal occupiers when they went to that particular area, to harvest the oil palm fruits there and were stopped from doing so. Since the illegal occupiers are not staying on the said land but next to it, even if there was actual inspection of the said land, it would not be possible for one to discover about the existence of the illegal occupiers as they are not staying on the said land, they would only appear and stake their claim when one tries to harvest oil palm fruits on that particular area of the said land.

Did the plaintiff suffer any loss and damage in consequence of the defendant's non-delivery of vacant possession of the said land or part thereof in breach of contract?

[15] In the light of my aforesaid finding in issue (10) above, I find that the plaintiff suffered loss and damage as a result of the defendant's non-delivery of vacant possession of a part of the said land amounting to 50.13 acres. Firstly the loss and damage suffered by the plaintiff is that they did not receive the 50.13 acres which they have already paid for and based on my computation of the price per acre of the said land, the value of the 50.13 acres is substantial, amounting to RM563,043.56, which is computed as follows:

RM5,501,430.00 ÷ by 500.13 acres = RM11,011.99 per acre, say RM11,012.00 per acre

RM11,012.00 x 51.37 acres = RM565,686.44

[16] Secondly the other loss and damage suffered by the plaintiff is the inability to harvest oil palm fruits from the said 50.13 acres and sell or process such oil palm fruits thus resulting in loss of income to the plaintiff.

What is the quantum of such loss and damage?

[17] In the light of what I have decided in issue (10) above, I shall proceed to consider this issue and assess the quantum of loss and damage suffered by the plaintiff.

[18] The plaintiff is claiming for, inter alia, the followings: A

(a) the sum of RM100,219 as at September 2005 and continuing until the date of delivery of vacant possession, being loss of the plaintiff's income;

(b) interest on RM100,219 at the rate of 8%pa from 1 October 2005 to the date of full payment; B

(c) the sum of RM636,683.75 as at 5 December 2005 being agreed liquidated damages at the rate of 10%pa on the sum of RM5,501,430 calculated from 9 October 2004 on a daily basis until the date of delivery of vacant possession and full payment; C

(d) specific performance of the SPA; and

(e) all necessary and consequential accounts, directions and loss.

[19] I shall consider each head of the plaintiff's claim as contained in the statement of claim. I find that the plaintiff's claim as contained in prayer (c) of the statement of claim which is based on cl 5 of the sale and purchase agreement, excessive and unreasonable, taking into consideration that the defendant only failed to deliver vacant possession of 51.37 acres out of 500.13 acres of the said land which roughly represented 10% of the whole of the said land. D E

[20] Section 75 of the Contracts Act 1950 provides that when a contract has been broken, if the sum is named in the contract as the sum to be paid in case of breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for. Thus I have a duty to determine what is the reasonable compensation to be paid to the plaintiff for this particular head of the plaintiff's claim in this case. In any event the plaintiff in their written submission dated 30 November 2009 has conceded that their claim will be based on 51.37 acres or 10% of the said land. F G

H

[21] I am of the opinion that the reasonable compensation payable for this head of claim is computed as follows:

RM5,501,430.00 ÷ by 500.13 acres = RM11,011.99 per acre, say RM11,012.00 per acre I

RM11,012.00 x 51.37 acres = RM565,686.44

[22] The 10%pa stated in cl 5 of the SPA should be based on the sum of RM565,686.44 (being the value of 51.37 acres, vacant possession of which the defendant has failed to deliver) and not based on RM5,501,430 which is the total purchase price of the whole of the said land amounting to 500.13 acres.

[23] Accordingly, I varied prayer (c) of the statement of claim as follows:

> the sum of RM65,893.14 as at 5 December 2005 being agreed liquidated damages at the rate of 10%pa on the sum of RM565,686.44 calculated from 9 October 2004 on a daily basis until the date of full and final payment.

[24] Prayer (d) of the plaintiff's statement of claim is for specific performance of the SPA. The law relating to specific performance is governed by the Specific Relief Act 1950. The relevant sections are ss 11, 18 and 21 of the Specific Relief Act 1950 which are of great utility. They enact as follows:

[25] Section 11(2) of the Specific Relief Act 1950 states as follows:

> Unless and until the contrary is proved the Court may presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

[26] Section 18 of the Specific Relief Act 1950 which is of great utility and it enacts as follows:

> (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach either in addition to, or in substitution for, its performance.
>
> (2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.
>
> ILLUSTRATION *A* contracts to sell a hundred gantangs of rice to *B*. *B* brings a suit to compel *A* to perform the contract or to pay compensation. The court is of opinion that *A* has made a valid contract and has broken it, without excuse, to the injury of *B*, but that specific performance is not the proper remedy. It shall award to *B* such compensation as it deems just.
>
> (3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

ILLUSTRATION *A* contracts with *B* to sell him a house for RM1,000, the price to be paid and the possession given on the 1 January. *A* fails to perform his part of the contract, and *B* brings his suit for specific performance and compensation, which is decided in his favour. The decree may besides ordering specific performance, award to *B* compensation for any loss which he has sustained by *A*'s refusal.

(4) Compensation awarded under this section may be assessed in such a manner as the court may direct.

(5) The circumstance that the contract has become incapable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section.

ILLUSTRATIONS (a) *A*, a purchaser, sues *B*, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The court may award *A* compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose. (b) *A* sues for the specific performance of a resolution passed by the directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The court may, under this section, award *A* compensation for the non-performance.

[27] Bearing s 18 in mind, I now pass to s 21, the relevant portion of which reads:

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by Court of Appeal.

(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance:

(a) ...

(b) Where the performance of a contract would involve some hardship to the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

[28] According to *Lee Hoy & Anor v Chen Chi* [1971] 1 MLJ 76, the court may not award compensation under s 18 of the Specific Relief Act 1950 if the plaintiff did not ask for specific performance in the first place. Indeed, s 18 of the Specific Relief Act 1950 is important. It concerns the award of damages either in addition to, or in substitution for, specific performance.

[29] The case of *Narayanan Chettiar s/o Raman Chettiar v Samuel Jivamoney Dass s/o Chelliah* [1986] 1 CLJ 579 held that where an order for specific performance would breach the principles of natural justice then damages would be the more appropriate remedy. Having considered the relevant laws and the circumstances of this case, I will not order specific performance as prayed for by the plaintiff for the reason that it will be too onerous on the defendant to order that the defendant deliver vacant possession of the remaining 51.37 acres of the said land as the illegal occupiers' problem is too long outstanding and the illegal occupiers seemed very stubborn and even if the defendant can obtained the necessary court order which the defendant had already obtained earlier, it would very difficult for the defendant to enforce the court order in the light of the tough and aggressive stance adopted by the illegal occupiers.

[30] In lieu of specific performance, I hereby order the defendant to refund the sum of RM565,686.44 with interests to the plaintiff, being the purchase price of the 51.37 acres, vacant possession of which the defendant has failed to deliver. Upon full payment of the said sum of RM565,686.44 and all interests, ownership of the said 51.37 acres on the said land shall revert back to the defendant.

[31] From the evidence adduced, has the plaintiff discharged the onus of proving the loss suffered in so far as prayers (a) and (b) of the statement of claim is concerned? I am in total agreement with the defendant's contention that the plaintiff has to prove its losses.

[32] In approaching the question, this court should not be oblivious of the restrictive construction to be placed on the words 'whether or not actual damage or loss is proof to have been caused thereby' and the onus of prove of actual loss/damage where there is evidence of loss, but the court finds it difficult to assess damages as there is no known measure of damages employable and the loss is not too remote and could be assessed by settled rules.

[33] In such a situation, it is incumbent upon the defendant to bring evidence to prove damages for the actual loss or damage suffered, and any failure to adduce would result in this court refusing to award such damages. Peh Swee Chin FCJ in the Federal Court case of *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 at p 829, stated:

> We hold that in any case where there is inherently any actual loss or damage from the evidence or nature of the claim and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence, or to prove damages for such actual loss or damage, will result in the refusal of the court to award such damages despite the words in question.

[34] In *Selva Kumar*, the Federal Court acknowledged that there is some actual loss/damage that could be assessed by settled rules nevertheless because of the failure by the innocent party to bring evidence to prove damages for the actual loss, the Federal Court ruled that damages have not been proved and ordered the refund of the money forfeited.

[35] The law is trite in that the person claiming damages must prove their damage. His Lordship Mohamad Azmi FCJ in *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577 at p 593 in referring to the case of *Bonham Carter v Hyde Park Hotel Ltd* (1948) WN 89, stated at p 606:

> … it is not enough to write down the particulars and so to speak, throw them at the head of the court saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it …

[36] Turning to the evidence adduced in this case and having scrutinised the same, I find that nowhere has the plaintiff adduced evidence to show and/or prove the loss/damage nor the amount of loss/damage suffered by them in so far as prayers (a) and (b) of the statement of claim are concerned. Other than mere testimonies from the plaintiff's witnesses that the plaintiff suffered loss and damages, there was no other proof of losses and damages suffered by the plaintiff. Applying the principle established in *Selva Kumar* and *Morello Sdn Bhd v Jaques (International) Sdn Bhd*, I rule that the plaintiff has failed and/or omitted to prove the actual loss or damage suffered by them in so far as prayers (a) and (b) of the statement of claim are concerned and by reason thereof, the court cannot determine the reasonable compensation envisaged by s 75 of the Contracts Act 1950. I accordingly disallowed prayers (a) and (b) of the statement of claim.

[37] In so far as prayer (c) of the statement of claim, I find that there is no necessity to adduce further proof of loss for this head of claim as it is clear on the face on the face of the SPA that and the evidence adduced that there was a failure and/or omission on the part of the defendant to deliver 51.37 acres of the said land to the plaintiff, for which the plaintiff has paid.

Is the plaintiff under a duty to mitigate its loss in consequence of the defendant's breach of contract by its failure to deliver vacant possession of the said land to the plaintiff timorously or at all?

[38] The explanation to s 74 of the Contracts Act 1950 imposed a duty upon the plaintiff to mitigate its loss as a consequence of the defendant's breach of the SPA. In the Privy Council case of *Jamal v Moola Dawood Sons & Co* [1916] 43 IA 6 (PC), Lord Wrenbury held thus:

> It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss subsequent upon the breach and cannot claim as damages ant sum which is due to his known neglect. But the loss to be ascertained as the loss as at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it.

[39] *Halsbury's Laws of England* (4th Ed) Vol 12, p 477 para 1193 states as follows:

> The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong, and if he fails to do so, he cannot claim damages for such loss which he ought reasonably to have avoided.
>
> … The plaintiff is only required to act reasonably, and whether he has done so is a question of fact in the circumstances of each particular case, and not a question of law. He must act not only in his own interest, but also in the interest of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter … The plaintiff is under no obligation to destroy his own property, or to injure himself or his commercial reputation, to reduce the damages payable by the defendant. Furthermore, the plaintiff need not take steps which would injure innocent parties.

[40] The defendant is contending that the plaintiff should have acted promptly to mitigate its loss by immediately taking legal action to bar the illegal occupiers from trespassing onto the said land. From the evidence adduced the plaintiff informed the defendant about the existence of the existence of the illegal occupier, 1 month after the signing of the SPA, sometime in the month of August 2004 and the defendant did not do anything despite repeated requests by the plaintiff. The plaintiff commenced legal action against the illegal occupiers on 23 June 2006. I find that the plaintiff did attempt to mitigate its loss by initiating legal action against the illegal occupiers even though they are not successful in resolving the problem. I find that such efforts on the part of the plaintiff are sufficient to discharge its duty to mitigate.

Whether the defendant, by the sale and purchase agreement dated 15 July 2004 made between the plaintiff and the defendant, had made or given any warranty that the whole of the subject land shall be free from illegal occupiers upon delivery of vacant possession of the subject land to the plaintiff?

[41] I have perused the sale and purchase agreement and the relevant clauses are cll 5 and 18 of the sale and purchase agreement states as follows:

Clause 5 states as follows:

DELIVERY OF POSSESSION

The Vendor shall deliver vacant possession of the said Land together with oil palm trees remaining intact to the Purchaser within one (1) day from the date of full payment of the purchase price to the Vendor or its Solicitor Provided That in the event the Vendor fails or refuses to deliver vacant possession of the said Land within the stipulated period the Vendor shall pay the Purchaser interest at the rate of 10% per annum on the purchase price calculated on a daily basis till the date of delivery of vacant possession without prejudice to the Purchaser's rights to other remedies in a court of law.

[42] Clause 5 of the sale and purchase agreement clearly imposed an obligation on the vendor to deliver vacant possession of the said land and that would mean that the whole of the said land shall be free from illegal occupiers upon delivery of vacant possession of the whole of the said land to the plaintiff.

[43] Clause 18 of the sale and purchase agreement states as follows:

INSPECTION OF LAND

The Purchaser shall be deemed to have inspected the said Land and shall not be entitled to make any requisition nor any objection to the state and nature of the said Land. *The Vendor shall however deliver vacant possession of the said Land together with the oil palm trees intact*. (Emphasis added.)

[44] I find that as part and parcel of the defendant's obligations under the SPA, to deliver vacant possession to the plaintiff, there is an implied warranty on the part of the defendant that the whole of the subject land shall be free from illegal occupiers upon delivery of vacant possession of the said land. This is in line with the definition of vacant possession in *Boo Kok Ngeak & Anor v Lim Kian Hoe & Anor*.

Whether the plaintiff shall be precluded or stopped from making requisition and/or objection in respect of the illegal occupiers occupying part of the subject land in light of cl 18 and item 2 of the recital of the sale and purchase agreement?

[45] Clause 18 of the SPA states as follows:

INSPECTION OF LAND

The Purchaser shall be deemed to have inspected the said Land and shall not be entitled to make any requisition nor any objection to the state and nature of the said Land. The Vendor shall however deliver vacant possession of the said Land together with the oil palm trees intact.

Item 2 of the Sale and Purchase Agreement states as follows:

The Purchaser has inspected the said Land which is cultivated with oil palm trees.

[46] Having read and construed cl 18 and item 2 of the preamble of the sale and purchase agreement, I find that cl 18 and item 2 of the sale and purchase agreement do not preclude or stop the plaintiff from making requisition and/or objection in respect of the illegal occupiers occupying part of the said land. In my opinion, cl 18 and item 2 are only relevant if there are complaints by the plaintiff about the physical condition of the said land and about palm trees on the said land. Furthermore the last sentence of cl 18 expressly states that 'the defendant shall however deliver vacant possession of the said land together with the oil palm trees intact'. This clearly imposed an obligation on the defendant to deliver vacant possession of the said land to the plaintiff, failing which the plaintiff shall be entitled to enforce this obligation imposed on the defendant, to deliver vacant possession of the whole of the said land.

Whether the defendant is in breach of the sale and purchase agreement in particular cl 5 thereof ie failing to deliver vacant possession of the subject land within the period stipulated whereby in fact the plaintiff's actual complaint against the defendant only concern the illegal occupiers occupying approximately 51.37 acres more or less out of 500.13 acres of the subject land?

[47] Based on the terms and conditions of the sale and purchase agreement, it is clear that the plaintiff agreed to buy and the defendant agreed to sell 500.13 acres as stated preamble 1 of the SPA of the said land (item 1 of bundle A) and the land title of the said land (item 2 of bundle A) and as well as delivery of vacant possession of the said land. There is no provision in the sale and purchase agreement, to allow for delivery of vacant possession of only a substantial part of the said land. In the light of the aforesaid, I find that the defendant is in breach of cl 5 of the sale and purchase agreement, for failing to deliver vacant possession of 51.37 acres more or less, out of 500.13 acres of the said land even though the said 51.37 acres constituted about 10% of the whole of the said land.

Whether the plaintiff owes the defendant a duty to mitigate its losses in consequence of the defendant's breach of the sale and purchase agreement and if so, whether the plaintiff had acted promptly to mitigate its losses?

[48] This issue is somewhat similar to issue (d) above which has been dealt with and considered by me.

Whether the plaintiff was informed by one Dato' Loo Pang Kee of the existence of squatters on the demised land?

[49] From the evidence adduced, the defendant alleged that immediately before the signing of the sale and purchase agreement, DW3 Dato' Loo Pang Kee informed PW1 that the squatters' problem has been resolved whilst the plaintiff denied having been told of such matters. The defendant denied receipt of such information from the plaintiff. In any event I am of the opinion that whether the plaintiff was informed by Dato' Loo Pang Kee about the existence of squatters is not important or material in that once the signing of the SPA is signed, all the terms and conditions contained in the sale and purchase agreement would supersede and override all or any oral representations (see ss 91 and 92 of the Evidence Act 1950) Furthermore, I find that even if DW3 did inform the plaintiff about existence of illegal occupiers on the said land and that it has been resolved, it could not be construed in any way or manner to mean that the plaintiff expressly or impliedly agreed to purchase the said land subject to the existence of squatters on the said land or that the defendant has delivered vacant possession of the whole of the said land to the plaintiff.

ORDER

[50] In the light of the aforesaid I therefore allow the plaintiff's claim in part and subject to the following variations which are as follows:

(a) interest at the rate of 10%pa on the sum of RM565,686.44 being the value of 51.37 acres, vacant possession of which the defendant has failed to deliver, calculated from 9 October 2004 on a daily basis until full and final payment of the sum of RM565,686.44 (pursuant to cl 5 of sale and purchase agreement);

(b) in lieu of specific performance, the defendant shall refund the sum of RM565,686.44 to the plaintiff, being the value of 51.37 acres, vacant possession of which the defendant has failed to deliver;

(c) Upon full payment of the said sum of RM565,686.44 and all interests, ownership of the said 51.37 acres on the said land, vacant possession of which has not been handed to the plaintiff, shall revert back to the defendant;

(d) interest at the rate of 8%pa on the said sum of RM565,686.44 commencing on the 9 October 2004 until full and final payment; and

A (e) legal costs on a solicitors and clients basis to be agreed otherwise to be taxed.

Plaintiff's claim allowed in part subject to certain variations with costs.

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Reported by Kohila Nesan

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